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No. 88-927

In the Supreme Court of the United States

OCTOBER TERM, 1988

KEYSTONE SHIPPING CO.,
PETITIONER,

v.

NEW ENGLAND ENERGY INC. AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Does the Federal Arbitration Act preempt state arbitration procedures that are consistent with its policies and provisions?

2. Can federal courts, pursuant to the Federal Arbitration Act and a complementary state arbitration statute, order consolidation of two arbitrations where the arbitration agreements are silent on the issue of consolidation?

PARTIES INVOLVED AND RULE 28.1 LIST

The caption of the case in this Court contains the names of all parties.

Respondents, New England Energy Incorporated ("NEEI") and New England Power Company ("NEP"), are subsidiaries of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79 to 79z-6 (1981). Respondents are affiliates of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company, Narragansett Energy Resources Company, NEES Energy, Inc., New England Electric Transmission Corporation, New England Hydro-Transmission Corporation, New England Hydro-Transmission Electric Company, Inc., New England Power Service Company, New England Collier Company (a joint venture of NEEI and Keystone Shipping Co.), Ocean State Power (a general partnership whose partners are Narragansett Energy Resources Company and subsidiaries of Eastern Utilities Associates, TransCanada PipeLines Limited, Newport Electric Company, and J. Makowski Associates, Inc.), and Samedan-NEEI Exploration Company (a partnership of NEEI and Samedan Oil Corporation, a subsidiary of Noble Affiliates). Respondent NEP is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation, and Yankee Atomic Electric Company.

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v.

NEW ENGLAND ENERGY INC. AND
NEW ENGLAND POWER COMPANY,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The respondents New England Energy Incorporated and New England Power Company (collectively, "NEEI/NEP") respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit reported at 855 F.2d 1 (1st Cir. 1988).

Statement of the Case

On January 15, 1988, NEEI/NEP commenced an action in state court seeking consolidation of the following two arbitrations:

(a) "Arbitration #1": an arbitration between petitioner Keystone Shipping Co. ("Keystone") and respondent New England Energy Incorporated ("NEEI") arising out of the operation of the coal carrying ship *Energy Independence*, and

(b) "Arbitration #2": an arbitration between New England Collier Company (the joint venture of Keystone and NEEI) ("NECCO") and respondent New England Power Company ("NEP") arising out of the operation of the *Energy Independence*.[1]

Each arbitration involves a common—indeed, central—question of law and fact: the proper rate to be paid by NEP to NECCO for the charter hire of the *Energy Independence* (App. at A-11 to A-13). Both arbitrations are required by contract to be held "in the City of Boston [Massachusetts] pursuant to the laws relating to arbitration there in force..." (App. at A-25 and A-26).

Based on diversity jurisdiction, Keystone removed the action to federal court. Relying on "the general language of the Supreme Court cases" and its understanding of *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), the district court held that it could not order consolidation in the absence of an express agreement to consolidate. The district court also found, however, that "significant economies, the chance of avoidance of inconsistent results, the close relationship of the parties and the commonality of significant portions of the evidence would warrant consolidation.... I want it clear, if I could consolidate, I would, but I don't think I can." (App. at A-22).

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[1] Both respondents are subsidiaries of New England Electric System, an electric utility holding company. Additional facts concerning the parties' contractual relationships, the *Energy Independence*, and the events giving rise to these arbitrations are set forth in the court of appeals' decision at App. A-2 through A-3 and A-11 through A-13.

In reversing the decision of the district court, the court of appeals considered two lines of cases: recent Supreme Court cases construing the Federal Arbitration Act,[2] 9 U.S.C. § 1 *et seq.* (the "Federal Act"), and federal precedent delineating federal preemption doctrine.[3] The court concluded that

> the Federal Arbitration Act has never been construed to preempt all state law on arbitration. We do not read the recent series of Supreme Court arbitration cases to establish such a proposition by implication. Those cases concerned only laws that would override the parties' choice to arbitrate rather than litigate in court, in direct conflict with the [Federal] Act's primary purpose of ensuring the enforcement of privately negotiated arbitration agreements. (App. at A-5).

The court of appeals then held that the Massachusetts arbitration consolidation provision, Mass. G.L. c. 251, § 2A, as applied in this case,[4] did not conflict with the Federal Act,

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[2] The court considered *Perry* v. *Thomas*, 107 S. Ct. 2520 (1987); *Shearson/American Express* v. *McMahon*, 107 S. Ct. 2332 (1987); *Mitsubishi Motors, Inc.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); and *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) (App. at A-3 to A-4).

[3] The court of appeals considered the "variants" of the preemption doctrine as set forth in *Louisiana Public Service Comm'n* v. *F.C.C.*, 476 U.S. 355, 368-69 (1986) and quoted in *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 848-49 (1st Cir. 1988) (App. at A-5). *See* note 7 *infra*.

[4] The court noted that the last sentence of the Massachusetts statute, Mass. G.L. c. 251, § 2A, which states that "[n]o provision in any arbitration agreement shall bar or prevent action by the court under this section," is not at issue because the arbitration agreements in question are silent with respect to consolidation (App. at A-6 n.3). If this last sentence were construed to empower judges to consolidate arbitrations despite contractual language to the contrary, it would be in conflict with section 4 of the Federal Act. No such conflict is before the Court in this case. Moreover, it seems probable that the Massachusetts Supreme Judicial Court, if confronted with the issue, would hold that the terms of an arbitration agreement governed by the Federal Act would override the statutory language in question. *Cf. Quirk* v. *Data Terminal Systems, Inc.*, 379 Mass. 762, 767 n.2 (1980) ("We reiterate that the parties are, of course, free to limit the arbitration provision as they see fit by the terms of their contract.")

which says nothing about consolidation. The court "disagree[d] that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four [of the Federal Act]."[5] (App. at A-6). According to the court:

> [N]othing in the recent series of Supreme Court decisions indicates that a state law whose purpose is to promote the expeditious resolution of cases *by means of the arbitral process* is at odds with the policy behind the Federal Arbitration Act. In each of the cases emphasized by [Keystone], the justices were faced with competing laws that would have placed claims in the courts instead of in arbitration. . . .
>
> The Massachusetts arbitration consolidation provision, as [NEEI/NEP] seek to enforce it, does not in any way limit "the broad principle of enforceability" of private agreements to arbitrate. There is no attempt here to divert a case from arbitration to court. Massachusetts seeks only to make more efficient the process of arbitrating. Although the Supreme Court has held that agreements to arbitrate must be enforced "even if the result is 'piecemeal' litigation," *Dean Witter Reynolds*, 470 U.S. at 221, the Court also has recognized the [Federal] Act's endorsement of "speedy and efficient decisionmaking," *id.* at 219. We fail to see why a state should be prevented from enhancing the efficiency of the arbitral process, so long as the state procedure does not directly conflict with a contractual provision. (App. at A-9 to A-10. Emphasis in original.)

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[5] The court of appeals did not, as Keystone claims, hold that "the language of Section 4 was irrelevant." (Petition at 4.) To the contrary, the court of appeals, after reasoned analysis, found that an order consolidating the arbitrations was " 'in accordance with [the] terms' " of the arbitration agreements. (App. at A-6 to A-7, quoting Section 4).

In reaching this result, the court described the decisions in *Weyerhauser*, *supra*, and *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987), as reflecting "a 'hands off' approach to arbitrable claims," and concluded "that neither the [Federal] Act nor Supreme Court precedent mandates such a narrowly circumscribed role for the courts." (App. at A-8).

Judge Selya dissented, stating that if an arbitration agreement "omits reference to consolidation, the parties have made a choice [to refuse to allow consolidation]." (App. at A-16). Based on that unwarranted assumption, the dissent argued that the Massachusetts statute conflicts with section four of the Federal Act, requiring courts to enforce arbitration agreements "in accordance with the terms thereof." 9 U.S.C. § 4. The dissent also apparently construed this Court's recent arbitration decisions as holding that the Congress had occupied the field such that state law was preempted without regard to whether it conflicted with or complemented the Federal Act (App. at A-16 to A-17).

Reasons for Denying the Writ

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FEDERAL ARBITRATION ACT AS CONSTRUED BY THIS COURT.

The court of appeals' decision is in full accord with this Court's decisions construing the Federal Act. As the court of appeals recognized, the Federal Act requires that courts " 'rigorously enforce agreements to arbitrate,' " *Shearson/American Express* v. *McMahon*, 107 S. Ct. at 2337 (quoting *Dean Witter Reynolds*, 470 U.S. at 221). Thus, in two recent decisions (*Southland* and *Perry*, note 1 *supra*, discussed further *infra*, section IA), this Court has held that state laws which *interfere with* the submission of disputes to the arbitral process as agreed to by the parties are preempted by the Federal Act. This Court has never held that state procedures which operate within the arbitral process are preempted. Where, as here, the state procedure does not conflict with the agreement of the parties, this Court's prior decisions indicate that the procedure is not preempted.

A. *In Its Recent Decisions Construing the Federal Arbitration Act, This Court Has Held That the Federal Act Creates a Federal Law of "Arbitrability," Not a Federal Law of Arbitration Procedures.*

In an effort to establish a conflict between the decisions of this Court and the court of appeals' decision, Keystone erroneously attempts to convert the Federal Act's creation of a "federal substantive law of arbitrability," *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. at 24, into "a uniform body of federal arbitration law superseding the policy concerns of the individual states." (Petition at 13, argument heading II). The Court has never held that the Federal Act creates "a uniform body of federal arbitration law." Rather, the Court's six recent decisions, *see* note 2, *supra*, all concern "arbitrability" or the "enforceability" of arbitration agreements in the face of other federal and state law that would divert resolution of an arbitration to a judicial forum. Of these six cases, only two concern preemption of state statutes—*Southland Corp.* v. *Keating*, *supra*, and *Perry* v. *Thomas*, *supra*. Each of those cases, unlike this case, concerned a state law that would have diverted a dispute from arbitration to the judicial process.

Indeed, both *Southland* and *Perry* make clear that the preemptive scope of the Federal Act is that of actual conflict. *Southland* involved a state franchise investment statute that would have caused an arbitration clause to be declared void and unenforceable; this statute was held to be in direct conflict with the Federal Act. *Id.*, 465 U.S. at 10-11. "We see nothing in the [Federal] Act indicating that the broad principle of enforceability is subject to any additional limitations under state law," the Court observed, *id.* at 11; "[C]ongress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16. *Perry* involved a state "wage collection" statute authorizing suit in

court without regard to any private agreement to arbitrate, which was "in unmistakable conflict" with Section 2 of the Federal Act. 107 S. Ct. at 2526.

The court of appeals' decision in this case fully recognized and implemented the Federal Act's policy of arbitrability. That decision is, therefore, consistent with this Court's prior rulings.

B. *This Court Has Never Held That the Federal Act "Occupies the Field," Thereby Preempting All State Arbitration Statutes.*

Keystone's claim that the court of appeals' decision conflicts with the Federal Act depends in the first instance on the erroneous notion that all state legislation has been preempted because Congress has mandated a "uniform body of federal arbitration law." (Petition at 13, argument heading II). According to Keystone, "[t]his Court has repeatedly stressed that the Federal Act...preempts the application of state arbitration laws to arbitration agreements falling within its ambit." (Petition at 7)[6] This Court has never so held.

The broad preemption for which Keystone argues takes place only where "Congress has legislated comprehensively,

[6] Keystone erroneously claims that recent Supreme Court cases support this proposition. (Petition at 7 and n.4.) In fact, those cases simply held that the Act mandates enforcement of arbitration agreements "notwithstanding any state substantive or procedural policies *to the contrary.*" *Moses H. Cone Hosp., supra*, 460 U.S. at 24 (emphasis supplied). In that regard, Keystone's citation (Petition at 10) of *Stewart Organization, Inc.* v. *Ricoh Corp.*, 108 S. Ct. 2239, 2242 and n.4 (1988), is misplaced. *Stewart* dealt with whether federal or state venue law should be applied in a diversity action. In this case, all parties and the court of appeals agree that the Federal Act applies. (App. at A-5 n.2). In *Stewart*, there was a clear conflict between state and federal law. *Id.* at 2241. In this case, the court of appeals held that the Massachusetts statute was consistent with the Federal Act and that a consistent state statute could supplement the Federal Act. To create a conflict between this Court's decisions and the holding of the court of appeals, Keystone has obscured a central element of the court of appeals' holding—that the Massachusetts statute is consistent with the Federal Act.

thus occupying an entire field of regulation and leaving no room for the States to supplement federal law." *Louisiana Public Service Commission* v. *F.C.C.*, 476 U.S. at 368.[7] Neither the terms of the Federal Act, its legislative history, nor the decisions of this Court support the position that Congress has preempted all state legislation. "None of the various preemption standards suggests that Congress intended the Federal Act to supersede all state arbitration law, and... Keystone does not argue to the contrary." (App. at A-5). Keystone should not be heard to change its position before this Court. In any event, its new position is incorrect.

Far from being comprehensive, the provisions of the Federal Act simply create a general requirement that courts—state and federal—enforce arbitration agreements that involve interstate commerce. Congress evidently intended to override the common law "anachronism" whereby some courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction.... This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." H.R. Rep. No. 96, 68th

[7] *Louisiana Public Service Comm'n* sets out six situations when preemption occurs: (1) "when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law"; (2) "when there is outright or actual conflict between the federal and state law"; (3) "where compliance with both federal and state law is in effect physically impossible"; (4) "where there is implicit in federal law a barrier to state regulation"; (5) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law"; and (6) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." 476 U.S. at 368-69. In evaluating whether state laws are preempted by the Federal Act, the Court has uniformly applied situation (2) ("outright or actual conflict"). It seems clear that situations (1), (3), and (4) have no relevance to this case. Keystone argues erroneously that situation (5) ("occupying the field") applies to the Federal Act (Petition at 8) and, without articulating this formulation, also seems to suggest that situation (6) (state law as an "obstacle" to accomplishment of Congress' objectives) mandates preemption of the Massachusetts statute (Petition at 13-16). NEEI/NEP deal with situation (5) ("occupying the field") in this section (I B) and with situations (2) ("outright or actual conflict") and (6) ("obstacle to Congress' objectives") in the next section (I C).

Cong., 1st Sess. 1-2 (1924), *quoted in Dean Witter Reynolds, supra*, 470 U.S. at 220 n.6. There is no indication that Congress sought to preempt all state legislation. Indeed, Congress did not even create independent federal question jurisdiction for suits brought pursuant to the Federal Act.

C. *This Court's Prior Decisions Mandate the Conclusion That the Massachusetts Statute Is Not Preempted by the Federal Act.*

Consistent with Congress' decision not to occupy the entire field of arbitration, when the Court has subjected state laws to preemption analysis in light of the Federal Act, it has required an outright or actual conflict between state and federal law. *See Perry* v. *Thomas, supra,* and *Southland Corp.* v. *Keating, supra.* In considering whether a state law conflicts with a federal statute, the Court is "guided by the familiar rule of construction that, where possible, provisions of a [state] statute should be read so as not to create a conflict." *Louisiana Public Service Comm'n, supra* at 370.

The state statute involved in this case in no way conflicts with the Federal Act. As the court of appeals correctly understood (App. at A-9), the Massachusetts arbitration provision as applied in this case has no impact on the primary policy underlying the Federal Act—enforcement of private arbitration agreements (*see Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. at 221). Moreover, it furthers the secondary policy of the Federal Act—encouragement of efficient and speedy dispute resolution (*id.* at 219).[8]

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[8] Keystone at one point seems to agree that consolidation may be more efficient, but suggests that after *Dean Witter*, efficiency is no longer an appropriate goal of the Federal Act (Petition at 9). However, this Court has never rejected efficiency as an objective of the Federal Act, but has merely held that efficiency could not override the Federal Act's principal goal—making sure that arbitration agreements are enforced. *See Dean Witter*, 470 U.S. at 221. After having read efficiency out of the Act, Keystone does an about-face and argues incorrectly that the Court should create uniform arbitration procedures because any variations from state to state would impair efficient resolution of disputes. (Petition at 16 and n.16). Keystone cannot have it both ways.

Unable to point to an actual conflict between the Federal Act and the Massachusetts statute, Keystone alleges that the court of appeals' decision "undermines the congressional policy to encourage arbitration of disputes and the congressional intent to create a uniform body of federal arbitration law superseding the policy concerns of the individual states" (Petition at 13, argument heading II).[9] As discussed *supra*, the Federal Act, as construed by this Court, rather than creating a uniform body of arbitration law, creates a uniform policy of "arbitrability." The Massachusetts statute neither conflicts with nor in any way stands as an obstacle to the accomplishment of that policy.

Apparently recognizing that the court of appeals' decision does not contravene the Federal Act's policies, Keystone asks this Court to depart from its prior decisions and preempt all state procedures, even those that do not conflict with the terms of an arbitration clause, as being an obstacle to achievement of the purposes of the Federal Act. It would have the Court believe that the court of appeals' decision would permit federal courts to intervene without limitation "to 'supplement' the terms of private arbitration agreements."[10] (See Petition at 14-15.) This

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[9] In so arguing, Keystone apparently contends that the Massachusetts statute is preempted because "state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Louisiana Public Service Commission* v. *F.C.C.*, 476 U.S. at 368-69. *See* discussion at note 7, *supra*, of preemption situation (6).

[10] It is far from clear whether state procedures that supplement agreements would tend to discourage or encourage agreements to arbitrate. Parties to an arbitration agreement that includes a general arbitration clause must believe that they will be bound by procedures not specifically described in their agreement. While some parties specify the source of the procedures, *e.g.*, the Rules of the American Arbitration Association ("AAA"), others presumably rely on the existence of procedures that are set by local or state law and would be reluctant to agree to arbitration if they thought that no such procedures existed. Here, the parties *in their arbitration clauses* (not in a general choice of law provision) chose "arbitration in the City of Boston pursuant to the laws relating to arbitration there in force." (App. at A-25 and A-26). By choosing the laws "relating to arbitration" in force in the City of Boston, the parties chose a set of arbitration procedures that include consolidation. The absence of a specific reference to consolidation in the

contention rests on the unsupported assertion that the hypothetical possibility of such state-mandated procedures—of which Keystone supplies no actual examples —will "prompt parties to resort to federal court before proceeding to arbitration." (Petition at 16). In short, the Court is asked to preempt *all* state legislation concerning arbitration to avoid the possibility that some states may at some future date pass some law that might interfere with the policies of the Federal Act.

In sharp contrast with Keystone's hypothetical scenario, the Massachusetts Arbitration Act, Mass. G.L. c. 251, § 1 *et seq.*, which is an enactment of the Uniform Arbitration Act, provides: that arbitration agrements are "valid, enforceable and irrevocable" (§ 1); for *summary* determination of suits involving "failure or refusal of a party to proceed to arbitration" (§ 2(a)); for stays of judicial proceedings involving issues subject to arbitration (§ 2(d)); and for broad enforcement of arbitral decisions (§§ 11-14). The "consolidation or severance" provision challenged by Keystone mandates that "[t]he court shall proceed summarily to the determination of the issue so raised." *Id.* at § 2A. The Massachusetts statute, on its face and as construed by the courts,[11] shares the identical objectives of

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agreements should be treated no differently than the absence of a listing of specific AAA rules when those rules have been adopted by reference.

Keystone's own conduct belies its argument that the court of appeals' decision imposes on parties the burden of "rul[ing] out consolidation" in their agreements (Petition at 13). It is Keystone that would use the federal courts to deprive parties in Massachusetts of the opportunity to incorporate by reference the state arbitration consolidation procedure. Keystone apparently believes that arbitration will be more attractive if parties must choose between listing specific procedures that will control the arbitration or arbitrating in a procedural vacuum. The belief is unsupported and counter-intuitive.

[11] *See, e.g., Quirk* v. *Data Terminal Systems, Inc.*, 379 Mass. 762, 766-67 (1980) (discussing the broad enforceability of arbitration agreements, and following the reasoning in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967) that "the arbitration procedure, when selected by the parties to a contract, [should] be speedy and not subject to delay and obstruction in the courts.")

the Federal Act—enforcement of arbitration agreements and speedy and efficient resolution of disputes. *Dean Witter Reynolds, supra*, 219, 221. Contrary to the dissent (App. at A-16), Massachusetts does not have a "pro-consolidation policy." Section 2A of the Massachusetts statute provides for "consolidation *or severance*" of arbitration proceedings (emphasis added). Massachusetts' policy is more accurately described as pro-fairness, pro-efficiency, and strongly pro-arbitration.

NEEI/NEP do not deny that state legislatures might enact procedures that conflict with the Federal Act. However, the possibility of such enactments does not justify preemption of all state legislation, including legislation that is consistent with the terms of the Federal Act and furthers its purposes.[12]

II. The Court of Appeals' Decision Creates No Significant Conflict Among the Circuits Requiring Resolution by This Court.

Keystone inaccurately contends that the court of appeals' decision significantly conflicts with the Ninth Circuit's decision in *Weyerhauser* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984), and the Fifth Circuit's decisions in *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1987) and *Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F.2d 22 (5th Cir. 1980). Those cases contain dicta which suggest that, if presented with the issue, the courts in question

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[12] Keystone cites (Petition at 11) Justice McReynold's dissenting opinion in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 131 (1924), which argued against allowing state-created variations in arbitration methods for maritime cases. But Justice Brandeis for the Court upheld a particular state-created method of arbitration for a maritime case because it dealt "merely with the [procedural] remedy", *id.* at 124, and thus "supplemented the substantive maritime law, and did not conflict with any essential feature of it." *Id.* at 124-125.

might well hold that the Federal Arbitration Act preempts a state consolidation procedure. However, those courts were not confronted with that issue. The "conflict" which Keystone claims is in fact no more than the potential for future conflict in cases which have not yet arisen.

The issue raised in the court of appeals' decision in this case has not been clearly presented to other courts of appeals. Neither *Weyerhauser* nor *Del E. Webb* addressed the validity of a state statute authorizing consolidation; both cases dealt with the court's inherent power under the Federal Act and Fed. R. Civ. P. 42(a) to consolidate and concluded that, absent express language in an arbitration agreement permitting consolidation, such power did not exist. *See Weyerhauser, supra* at 637; *Del E. Webb, supra* at 149-50.[13] The First Circuit "[did] not decide whether a federal court also has the power, under Fed. R. Civ. P. 42(a), to order consolidation in the absence of a state law providing for it." (App. at A-3). Assuming *arguendo* that consolidation on the basis of Rule 42(a) or the federal court's inherent power might be inconsistent with the Federal Act, it does not follow that state consolidation statutes should be preempted. Judicially created federal law favoring consolidation would be more easily preempted than state law because principles of federalism requiring deference to state law would be inapplicable. *See Milwaukee* v. *Illinois*, 451 U.S. 304, 316-17 (1981).

Any difference in approach that may exist, therefore, is at a relatively undeveloped stage. Only the Court of Appeals for the First Circuit has squarely addressed the question whether the Federal Act preempts even complementary state statutes. If the Court addresses the issue at this time, it will not have the benefit of full consideration by a number of courts of appeals.

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[13] Although *Huber, Hunt & Nichols, supra*, held that federal law and not Louisiana law governs consolidation of arbitrations, the court was not confronted with a state statute authorizing consolidation and apparently did not undertake preemption analysis.

To the extent the circuits diverge, the divergence here is not of great moment. Each of the First, Fifth, and Ninth Judicial Circuits fully implements the primary policy of the Federal Act—the enforceability of arbitration contracts. The different outcomes among the circuits as to whether the arbitrations could be consolidated resulted largely from differences in contract interpretation and not from conflicting views of the Federal Act.[14] The *Weyerhauser* court assumed that where an arbitration agreement is silent with respect to consolidation, ordering consolidation would be *contrary* to Section 4 of the Federal Act, which requires courts to direct the parties "to proceed to arbitration in accordance with the terms of the arbitration agreement." 743 F.2d at 637; *accord Del E. Webb*, *supra* at 150. The Court of Appeals for the First Circuit

> disagree[d] that ordering consolidation pursuant to a state statute when the contract is silent on the subject improperly modifies the agreement struck by the parties in violation of section four. We believe. . . that an order not contradicting the contractual terms regarding arbitration is "in accordance with [those] terms." This is certainly true when the language of the arbitration clause is broad and in no way suggests limits on the subjects or

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[14] The courts of appeals are in agreement that the determination of whether two arbitrations can be consolidated is essentially a matter of contract interpretation. The court in *Del E. Webb*, *supra* at 150, found that "Paragraph 7.9.1 [of the arbitration agreement] explicitly excludes the architect from consolidated arbitration." The *Weyerhauser* court, *supra* at 637, found that "each [arbitration] clause requires only arbitration between the parties to the agreement. In fact, Trans-Pacific specifically secured an addendum to its agreement with Weyerhauser insulating Trans-Pacific from any increase in its obligations by reason of any subcharter Weyerhauser might execute." In this case, the First Circuit applied principles of contract interpretation to determine that ordering consolidation pursuant to the Massachusetts statute accorded with the terms of the arbitration agreements (App. at A-6 through A-7).

> parties to the agreed-upon arbitration.... [A] person directed to take an early plane to New York would be acting "in accordance with" her instructions whether she flew coach or first class, notwithstanding the instructions' silence on the type of seat to purchase. Our traveller also would not violate her instructions, which were silent on how she was to get to the airport, if she were to take a taxicab. Simply put, arbitration is still arbitration even if it is consolidated arbitration. (App. at A-6 through A-7.)

Presumably there are a multitude of arbitration contract clauses whose "terms" require interpretation each year. A difference among the circuits as to meaning of the "terms" of a given clause and as to the parties' intentions concerning a subject upon which the agreement is silent does not present an issue of sufficient significance to merit granting the writ.

Moreover, variations from court to court and circuit to circuit with respect to the specific procedures for carrying out the Federal Act are inevitable. Even in the Ninth Circuit, which disfavors consolidation except where specifically required by contract, district courts will necessarily make decisions comparable to those relating to consolidation in determining whether to order a dispute to arbitration. For example, if an arbitration is already in progress and one of the parties initiates a new arbitration on an overlapping or identical issue, a court would likely treat the new arbitration as included in the prior arbitration. Where such "inclusion" leaves off and consolidation begins is a question of line drawing. How various courts draw such lines has no impact on the policy of arbitrability, is inevitable in a system that seeks to decide individual cases fairly and expeditiously, and therefore does not present an issue that needs to be resolved by the Court.

Conclusion

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting the Court's review, and the Court should deny the petition.

Respectfully submitted,

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